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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

In re A.W.-H., a Person Coming
Under the Juvenile Court Law.

A160136

CONTRA COSTA COUNTY
CHILDREN AND FAMILY
SERVICES BUREAU,

(Contra Costa County
Super. Ct. No. J1800936)

Plaintiff and Respondent,

v.

S.H.

Defendant and Appellant.

Following a contested hearing under Welfare and Institutions Code section 366.26, ¹ S.H. (mother) appeals from an order terminating her parental rights and making her four-year-old daughter eligible for adoption.² As we find no merit to S.H.'s claim on appeal that the

¹ All further unspecified statutory references are to the Welfare and Institutions Code.

² Although the juvenile court also terminated the parental rights of the child's presumed father, he is not a party to this appeal.

juvenile court erred by declining to apply the beneficial parental relationship exception (*id.*, subd. (c)(1)(B)(i)), we affirm.

FACTS

A. Section 300 Petition

In October 2018, the Contra Costa County Children and Family Services Bureau (the agency) removed S.H.'s daughter and filed a section 300 petition based on the allegation that the child was at substantial risk of harm due to S.H.'s alcohol use. In January 2019, the juvenile court declared the just turned three-year-old child a dependent of the court, granted the agency custody to place the child with her maternal grandparents, and ordered reunification services for S.H. At the "six-month review" in July 2019, the juvenile court returned the child to S.H.'s care with family maintenance services.

B. Section 387 Supplemental Petition

Two days after being returned to S.H.'s custody, the child was again removed when the agency received a laboratory report that S.H. tested positive for cocaine on July 8 and S.H. admitted cocaine use on July 5 or 6. After the agency received a further report that S.H. tested positive for cocaine on July 15, a section 387 supplemental petition was filed alleging the child was at substantial risk of harm due to S.H.'s use of cocaine.

Following an August 15, 2019 jurisdictional hearing on the supplemental petition, the juvenile court found the child was one described in section 300, the agency was granted custody, and the child was placed in a foster care home as her maternal grandparents were

unavailable. S.H. was granted supervised one-hour weekly visits and one telephone call a week. Noting the recent cocaine use, the juvenile court denied her request for additional visits and calls.

Before the dispositional hearing on the supplemental petition, the agency filed a report asking the court to terminate S.H.'s reunification services and schedule a section 366.26 hearing to determine the child's permanent placement. The report provided an overview of the supervised visits and the child's circumstances since her second removal in mid-July 2019 through the end of September 2019. During that period, S.H. had attended all scheduled weekly visits, except for one visit when she was out of town with her boyfriend. During these visits, S.H. was attentive (playing games, eating snacks, taking photographs), physically affectionate, and demonstrated appropriate discipline. The child appeared happy and had "adjusted well" to her foster care placement, but her foster care parents reported that the child's tantrums had increased during the last month. Because the agency social worker believed the child was struggling with losing her mother and grandparents at the same time, a referral was made for "play therapy."

The agency social worker further reported that S.H. missed several drug tests with no excuses except for two occasions when she was out of town, failed to attend required outpatient drug treatment, AA meetings, or therapy, lied to the social worker about attending outpatient drug treatment and why she missed a drug test, and lied to the child (in a telephone call) as to the reason for a missed visit. The agency social worker believed that S.H. and the child "share a special

bond and want to be together” but she did not think the child would be returned to S.H.’s care within the statutory reunification period.

At the November 7, 2019 contested disposition hearing, agency counsel submitted on the agency report and asked the court to make necessary findings to terminate S.H.’s reunification services. S.H.’s counsel argued against termination of services, but proffered no additional evidence. The juvenile court terminated S.H.’s reunification services and set a section 366.26 hearing for February 26, 2020. Over S.H.’s objection, the juvenile court reduced her supervised visits to a minimum of one hour once a month, with the proviso that the agency could increase visits if S.H. took her own steps to address her substance abuse problem by testing negative for alcohol and drugs. Neither S.H. nor the juvenile court mentioned the previous court order allowing for telephone contact. S.H. was informed of her statutory rights, but she did not file a writ petition challenging the setting of the section 366.26 hearing.

C. Section 366.26 Hearing

Before the section 366.26 hearing, the agency submitted a report recommending termination of S.H.’s parental rights (as well as those of the presumed father) and adoption as the child’s most appropriate permanent placement. The agency opined that if parental rights were terminated there was a likelihood the child would be adopted by either the child’s current foster care mother (“prospective adoptive mother”) or other available families and that “the current parent child relationship” did not “outweigh the benefits of adoption.” The agency reported that S.H. had consistently visited the child during the entirety of the case, noting that since the child’s second removal in July 2019 S.H. had

attended 10 scheduled weekly supervised visits between July 23 and November 1 and two scheduled monthly supervised visits in December 2019 and January 2020. The visits were as previously described in the earlier report.

The agency also submitted a February 7, 2020 report by the child's therapist, who had treated the child since October 2019 (when the child was in placement with her former foster care parents) and thereafter with her prospective adoptive mother starting in January 2020. During the child's former foster care placement, the therapist observed the child in school -- the child socialized well with other children and her teachers said the child was helpful, playful, and eager to learn. The therapist never observed the child interact with her former foster care parents, but the child's former foster father said the child was irritable, agitated, threw tantrums, and engaged in oppositional behavior.

The therapist further commented that since the child began in her current placement, she "seems to seek out her emotional needs (affection, warmth, attentive) from the prospective adoptive mother and calls her 'mommy.' The prospective adoptive mother appears to be emotionally responsive towards [the child] as well (attuned to her needs, providing warmth, and structure). As a result, it appears that they are developing a closer bond and healthy attachment as time passes and therapy progresses. We are working on the prospective adoptive mother's understanding of the impact of [the child's] trauma history and how it affects her developmentally and emotionally. This will provide the prospective adoptive mother with deeper insight regarding [the child's] behaviors or responses when triggered." (Italics

omitted.) During the therapist's first visit to the prospective adoptive mother's home, the child "was eager" to show her new room and her toys, "not appearing worried or afraid about her new environment, but rather excited." (*Italics omitted.*)

The therapist also reported, under the heading "Diagnosis and Goals," that the child's symptoms (increased irritability, easily angered, and physical aggression) impaired her social, emotional, and psychological functioning at home and school but that these were symptoms of her diagnosed adjustment disorder with mixed anxiety and depressed mood and would improve by virtue of developing healthy attachment and coping skills with a trusted caregiver or individual.

The agency submitted the prospective adoptive mother's statement that the child " 'is friendly and fun loving, and wants to be involved with what is going on around her. She is inquisitive, and generally adventurous. Emotionally, she is generally happy, although she mentions her mother, grandmother, and great grandmother often and says that she misses them. [The child] can be insubordinate and has small tantrums periodically, but nothing extreme and it seems to be normal for a child her age. I believe that her overall adjustment to me and my home has been good, and is proceeding in a positive direction. She refers to me now as 'Mommy,' and tells me that she wants to stay with me at my house. She also seeks assurances sometimes when I drop her off at preschool that I will be picking her up that evening (I always do, but she sometimes seeks the reassurance).' "

At the section 366.26 hearing, held in February and March 2020, the juvenile court reviewed the agency's report and heard testimony from S.H. and the current agency social worker (preparer of agency

report). The agency social worker testified as follows. She met the child in October 2019 and was assigned to the case on December 20. There was a bond between S.H. and the child based on the child's statement that she missed her mother (made to her prospective adoptive mother) and the previous agency reports' descriptions of supervised visits and the former social worker's opinion that the child "appear[ed] to be struggling with losing her mother and grandparents at once." While the child called S.H. "Mom," the child also used the phrase "mother" when referring to both her prospective adoptive mother as well her former foster care mother.

S.H. testified that she was not currently drinking or using drugs and was not in any kind of drug treatment program. When the child had not been in her care, S.H. admitted using cocaine on one occasion because she thought her usage would not register on a drug test for alcohol and did not recall testing positive for cocaine on two occasions. S.H. denied lying to the social worker about the reason for a missed drug test and planned visit in September 2019, testifying she had told the social worker about proposed plans that then changed to going out of town with her boyfriend. Mother was not questioned about what she had told the child about the missed visit. S.H. testified she had stopped drinking "[s]ome years" ago and the last time she drank was before July 2019, but also admitted she drank during the September 2019 out of town trip.

S.H. also described a typical visit with the child and submitted photographs taken at the last visit in February 2020. The visits were hard on the child based on the child's facial expressions and she did not like to leave. During the last visit the child had asked "when she can

go home with her real mom and not the fake mom,” a phrase the child came up with for her prospective adoptive mother. S.H. believed that if her parental rights were terminated the child would be “destroy[ed] [] mentally and physically;” mother had heard things about children who were adopted and she did not think adoption would be in the child’s best interest as S.H. could “provide a good life for [the child].” S.H. was not questioned about any telephone contacts she may have had with the child between visits.

The juvenile court reviewed the history of the case, found the agency social worker to be a credible witness and the therapist’s report to be of value, and did not find credible S.H.’s testimony that she used cocaine on just one occasion. The court found, by clear and convincing evidence, that the child was “both generally and specifically adoptable,” noting that while the child had some health issues, she was “by all accounts . . . a beautiful, lovable, happy . . . child” and the current caregiver unequivocally wanted to adopt the child and the child wanted to stay with the caregiver. The court commented that the four-year-old child was apparently confused by the situation, noting she called S.H. and the prospective adoptive mother “Mommy,” and while the child had a strong bond with the prospective adoptive mother, she also sought affection, warmth, and attention during visitation.

Having found the child was likely to be adopted, the juvenile court next addressed the application of the beneficial parental relationship exception to termination of parental rights. The court found S.H. had “maintained regular contact and visitation with the child and has a relationship with the child that is a good, healthy, beneficial relationship.” The visits “have gone well. [S.H.’s] made

most, or if not all of the visits, but certainly most of the visits,” and the court had “no doubt” S.H. and daughter loved each other, which made “this a very difficult case.”

Nonetheless, the court found S.H. had not met her burden of proving that termination of her parental rights would be so detrimental as to outweigh the benefits “of adoption with its permanency and all the benefits of adoption . . . with a caregiver who is willing and ready to adopt and is providing care and warmth and attention.”

DISCUSSION

I. Juvenile Court Properly Declined to Apply the Beneficial Parental Relationship Exception to Termination of Parental Rights

A. Legal Framework and Standard of Review

“By the time of a section 366.26 hearing, the parent’s interest in reunification is no longer an issue and the child’s interest in a stable and permanent placement is paramount. [Citations.] ‘In light of the earlier judicial determinations that reunification cannot be effectuated, it becomes inimical to the interests of the [child] to heavily burden efforts to place the child in a permanent alternative home.’ [Citation.] The child has a compelling right ‘to [have] a placement that is stable, permanent, and that allows the caretaker to make a full emotional commitment to the child.’ [Citation.] Adoption is the Legislature’s first choice because it gives the child the best chance at such a commitment from a responsible caretaker. [Citations.]” (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1348 (*Jasmine D.*)). “[B]ecause a section 366.26 hearing occurs only after the court has repeatedly found the parent unable to meet the child’s needs, it is only in an *extraordinary case* that

preservation of the parent’s rights will prevail over the Legislature’s preference for adoptive placement.” (*Id.* at p.1350; italics added.)

To avoid termination of their rights, parents have “ ‘the burden of proving, by a preponderance of the evidence, that one or more of the statutory exceptions . . . set forth in section 366.26, subdivision (c)(1)(A) or (B) apply.’ ” (*In re Anthony B.* (2015) 239 Cal.App.4th 389, 395 (*Anthony B.*)). The beneficial parental relationship exception requires the juvenile court to find a “*compelling reason*” for determining that termination would be detrimental to the child where “[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.” (§ 366.26, subd. (c)(1)(B)(i); italics added.) Thus, “a parent may not claim entitlement to the exception . . . simply by demonstrating some benefit to the child from a continued relationship with the parent, or some detriment from termination of parental rights.” (*Jasmine D., supra*, 78 Cal.App.4th at p. 1349.)

The juvenile court’s analysis of the application of the beneficial parental relationship exception has two inquiries, one being “whether there has been regular visitation and contact between the parent and child,” and the other “whether there is a sufficiently strong bond between the parent and child that the child would suffer detriment from its termination.” (*In re Grace P.* (2017) 8 Cal.App.5th 605, 612 (*Grace P.*)). The standard governing our review of the juvenile court’s ruling is currently pending before our Supreme Court. (*In re Caden C.* (2019) 34 Cal.App.5th 87 (*Caden C.*), rev. granted July 24, 2019,

S255839)³.) In the interim, we will continue to use a hybrid standard as described in *In re E.T.* (2018) 31 Cal.App.5th 68 (*E.T.*): we apply “ ‘the substantial evidence standard of review’ ” to the factual issue of whether S.H. maintained regular visits and contact with the child and “ ‘the abuse of discretion standard to the determination of whether there is a compelling reason for finding that termination would be detrimental to the child.’ ” (*Id.* at p. 76, quoting *Anthony B.*, *supra*, 239 Cal.App.4th at p. 395; see *Caden C.*, *supra*, at p. 106 [following hybrid standard of review used in *E.T.*].)

B. Analysis

For the reasons set forth below, we conclude that the juvenile court did not abuse its discretion in finding that S.H. had failed to show the child would be deprived of “a substantial[,] positive relationship” such that she “would be greatly harmed” by termination of parental rights. (*Grace P.*, *supra*, 8 Cal.App.5th at p. 610.)

S.H. challenges the juvenile court’s lack of detriment finding because the child was bonded to her “to a degree” that required the continuation of the relationship. She asks us to consider that her daughter had been initially removed based on a potential (not actual) harm, that she was progressing toward rehabilitation, and that her interactions with the child were consistent and consistently positive. S.H. avers that the only reasonable inference to be drawn is that the

³ In granting review in *Caden C.*, *supra*, 34 Cal.App.5th 87, the Supreme Court has asked the parties to brief and argue the following issues: “(1) what standard governs appellate review of the beneficial parental relationship exception to adoption; and (2) whether a showing that a parent has made progress in addressing the issues that led to dependency is necessary to meet the beneficial parental relationship exception.”

child would be seriously harmed by the loss of the “consistent and positive relationship she shared” with her, particularly because the child had only been in the prospective adoptive home for two months at the time of the section 366.26 hearing.

These arguments misconstrue our limited authority to overturn the juvenile court’s exercise of its discretionary authority. (*Jasmine D., supra*, 78 Cal.App.4th at p. 1351.) When a juvenile court’s ruling is subject to review for an abuse of discretion, we “‘will not disturb that decision unless the [juvenile] court has exceeded the limits of legal discretion by making an arbitrary, capricious, or patently absurd determination. . . . When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the [juvenile] court.’” (*Ibid.*)

By the time of the section 366.26 in March 2020, the child had been out of S.H.’s custody since October 31, 2018 except for two days in July 2019. The parties appear to agree, and we concur, that the record supports the juvenile court’s factual finding that S.H. maintained regular visits and contact with the child to the extent permitted during the dependency. (*In re I.R.* (2014) 226 Cal.App.4th 201, 212 “[r]egular visitation exists where the parents visit consistently and to the extent permitted by court orders”].)

However, S.H.’s reliance on her circumstances and visits during the child’s first removal from her care (November 2018 through mid-July 2019) is not persuasive as we are here concerned with their relationship at the time of the section 366.26 hearing. During the child’s second removal (mid-July 2019-March 2020), S.H. made no substantial efforts to address her substance abuse and had not

progressed beyond supervised one-hour weekly visits between July 23 and November 1. Following the November 2019 dispositional hearing, S.H. attended supervised one-hour monthly visits (December 2020-February 2020), but made no effort to expand that visitation by submitting negative tests for alcohol and drugs. At the section 366.26 hearing, S.H. presented no evidence regarding any telephone contacts with the child between visits.

We see nothing in the record that calls into question the juvenile court's rejection of S.H.'s assertion that the child " 'would be greatly harmed' " or "suffer great detriment" if visits were not continued. (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 229.) "No matter how loving and frequent the contact, and notwithstanding the existence of an 'emotional bond' with the child, 'the parents must show that they occupy "a parental role" in the child's life.' " (*In re K.P.* (2012) 203 Cal.App.4th 614, 621.) While S.H.'s conduct here was appropriate and the child enjoyed the visits, there was no evidence the visits while "pleasant and emotionally significant" to the child bore any "resemblance to the sort of consistent, daily nurturing that marks a parental relationship." (*In re Derek W.* (1999) 73 Cal.App.4th 823, 827.) " [A] child should not be deprived of an adoptive parent when the natural parent has maintained a relationship that may be beneficial to some degree but does not meet the child's need for a parent. It would make no sense to forgo adoption in order to preserve parental rights in the absence of a real parental relationship." (*Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1350.)

Nor are we persuaded by S.H.'s assertion that there is evidence showing she is "uniquely capable of managing [the child's] emotions."

In support of this argument S.H. asks us to consider the therapist's report that the child's behavior improved and the child had no tantrums during visits. However, her argument ignores the fact that juvenile court could and did find the therapist's report supported just the opposite conclusion, namely, that the child's emotional needs were being met by her prospective adoptive mother.⁴ While the four-year-old child had been living with the prospective adoptive mother for only two months, the child had adjusted and they were forming a bond. The child's therapist gave no indication in his report and S.H. proffered no evidence (except her own testimony) from which the juvenile court was required to find the child "had any needs only [mother could] satisfy or that [the child] ha[d] the type of emotional attachment to [mother] that would cause [the child] to be greatly harmed if parental rights were terminated." (*In re Jason J.* (2009) 175 Cal.App.4th 922, 938; see *In re C.F.* (2011) 193 Cal.App.4th 549, 557 [beneficial parental relationship exception not applicable where parent and children "had pleasant visits, and her daughter was sometimes sad to see them end, there is no bonding study or other evidence that shows [mother] occupied a parental role in their lives, that they would suffer any actual detriment on the termination of parental rights, or that the benefits of continuing the parental relationship outweighed the benefits of permanent placement with [prospective adoptive] family members who were ready to give them a permanent home"].)

⁴ The juvenile court was "impressed" by the therapist's report as "he has had a lot of contact with [the child] weekly in the home of the current caregiver, and seems to have a very deep understanding of [the child's] needs and status."

Finally, we disagree with S.H.’s contention that reversal is required because her case is similar to cases in which courts determined that termination of parental rights would be detrimental, specifically *In re Scott B.* (2010) 188 Cal.App.4th 452 (*Scott B.*), *In re S.B.* (2008) 164 Cal.App.4th 289 (*S.B.*) and *E.T.*, *supra*, 31 Cal.App.5th 68. The mere recitation of the circumstances of the cited cases demonstrates they are completely inapposite and do not support reversal.

In *Scott B.*, *supra*, 188 Cal.App.4th 452, the mother provided stability to the life of the eleven-year-old child, which is “what adoption was supposed to do but may not in this case.” (*Id.* at pp. 471, 472.) “Given [the child’s] strong emotional attachment to [his mother], his continued precarious emotional state, and his history of regressing and running away when he is stressed, there is a very good chance that he will have a meltdown if his usual frequent visitation with [his mother] does not continue. The only way to avoid that serious emotional and developmental setback and ensure that [the child’s] usual visitation with [his mother] continues is by court order. The only way to have such an order is to have [the child’s] permanent plan be legal guardianship or long-term foster care. . . . The record demonstrates that adoption, with its inherent possibility that [the child’s] usual contacts with [his mother] would be interrupted, poses the chance of a danger not worth taking.” (*Id.* at p. 472.)

In *S.B.*, *supra*, 164 Cal.App.4th 289, both the agency social worker and a bonding expert testified to detriment to the five-year-old child if parental rights were terminated. (*Id.* at pp. 295-296.) The appellate court also found significant that father “complied with ‘every

aspect’ of his case plan: [he] immediately recognized that his drug use was untenable, started services, maintained his sobriety, sought medical and psychoanalytic services, and maintained consistent and regular” contact with the child by attending supervised visits two or three times a week. (*Id.* at pp. 295, 298.)

In *E.T., supra*, 31 Cal.App.5th 68, mother self-reported a drug relapse to the agency, reentered drug treatment, and arranged for her then three-year-old twin children to be placed with their godparents. (*Id.* at pp. 72, 73, 74.) During “supervised and therapeutic” weekly visits mother was able to address the children’s fear and anxiety regarding their permanent living situation and mother also regularly spoke with the children by telephone once or twice a week. (*Id.* at pp. 72-73). Even though the mother had been denied reunification services, she continued in drug treatment and at the time of the section 366.26 hearing she was still “regularly” participating in AA/NA sessions, attending “classes in life skills, parenting, cognitive behavior, criminal thinking, anger management, acupuncture, and children of alcoholics and addicts,” and the agency staff believed the mother “*should always*” be in the lives of the children. (*Id.* at pp. 73, 74, 78; italics added.)

We therefore must affirm the juvenile court’s findings and order as we find no record evidence of extraordinary circumstances requiring application of the beneficial parental relationship exception to the termination of mother’s parental rights.

DISPOSITION

The juvenile court’s findings and order of March 11, 2020 are affirmed.

Petrou, J.

WE CONCUR:

Siggins, P.J.

Fujisaki, J.

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